90-553

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

September Term 1990

BARBARA J. GOURAS (WADE),

Petitioner,

v.

BURROUGHS WELLCOME COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the appellate court err in concluding that the decision of the Benefits Committee could withstand scrutiny under the arbitrary and capricious standard of review when no evidence of a vocational expert, as was mandated in Gunderson v. W.R. Grace & Co. Long-Term Disability Income Plan, 874 F.2d 496 (8th Cir. 1989), was presented?

2. Did the appellate court err in declining to consider the issue of whether social security law was applicable?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. A, infra, A-1 -- A-12) and the order of the district court (App. B, infra, A-13 -- A-22) are unpublished.

JURISDICTION

The petitioner first brought this action in the Pitt County Superior Court of North Carolina. The respondent removed the action to the United States District Court for the Eastern District of North Carolina. Jurisdiction was invoked on the basis of the Employment Retirement Income Security Act of 1974 (1974), 29 U.S.C. Sec. 1001 et seq.

On August 15, 1989, the district court entered an order and judgment granting the respondent's motion for summary judgment.

On petitioner's appeal, the United States Court of Appeals for the Fourth Circuit on May 7, 1990, entered a judgment and opinion affirming the district court.

On June 18, 1990, the Fourth Circuit denied petitioner's petition for rehearing and suggestion for a rehearing in banc.

The jurisdiction of this court to review the judgment of the Fourth Circuit is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves 29 United States Code, sec. 1001 et. seq., the respondent having set up a disability plan under said statute, dealing with the Employee Retirement Income Security Act (ERISA) (A -).

Also involved is 42 United States, Sec. 423(d)(1)-(2) (A), and -(3), where is found the definition of disability under the Social Security Act. The respondent, in its disability plan, cited said provision and provided that the participant under its plan would be under a "disability" as defined in the provisions of said section 423. (A -).

STATEMENT OF THE CASE

Mrs. Wade was employed by Burroughs Wellcome in their production facility near Greenville, North Carolina, on December 26, 1978, where she worked as a Sterile Operator until she was injured on the job on May 29, 1979 (J.A. 16, 17)("J.A." refers to the Joint Appendix filed in the appellate court). Burroughs Wellcome paid Mrs. Wade from their Sickness and Accident Plan until she exhausted those benefits (J.A. 17)and, she having shown no significant improvement, began paying her benefits from their Long-Term Disability Plan ("the Plan"), which was set up under the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 USCS Sec. 1001, et seq, said plan (J.A. 17 & 40) providing in part:

> Total Disability. A participant shall be determined

> by the Committee to be 'totally disabled' if (1) during the first year of any period for which a claim is made hereunder, the participant is unable, mentally or physically, to perform (i) the usual labor or services required of the participant as a full-time employee of the Company and (ii) any other labor or services required of the participant by the Company taking into account the participant's education, training and experience; or (2) during the continuation of such period beyond one year, the participant is under a 'disability' as that term is defined in Section 423 (d) (1) - (2) (A), and - (3) of Title 42 of the United States Code, as in effect on January 1, 1976.

(J.A. 40)

The parties agree that the physicians who examined Mrs. Wade from 1979 through 1983 all concluded that she was totally disabled as defined by the the Plan, and thus entitled to receive weekly long-term disability benefits in the amount of $97.48.

On September 11, 1984, Mrs. Wade was examined by Dr. Lee A. Whitehurst, of the Raleigh Orthopaedic Clinic, whose office

notes reflect his postulations that Mrs. Wade would be able to do sedentary work, although he otherwise recommended that she be given a permanent partial disability base (J.A. 34). Thereafter, the benefits committee continued Mrs. Wade as totally disabled under the Plan (J.A. 17, 18). One year later, on September 16, 1985, Dr. Whitehurst again made similar findings (J.A. 18, 19, 34), including the following:

> . . . she relates that she continues to have symptoms as she did when she was last seen (J.A. 34, p. 1). . . that she has been unable to return to work because of the low pain in her back and in her left arm . . . and numbness in her leg (Id. p. 2). . . that she continues to have difficulty with her left arm---that x-rays show a change in her left elbow---an area of degeneration (Id. p. 2)---I would recommend that the recommendations given on the report of September 11, 1984, should be followed in regard to her permanent partial disability, if she does not

> feel that her symptoms warrant surgical intervention. . . .

(J.A. 34, pp. 1 & 2).

Thereafter, on October 10, 1985, Kenneth W. Kidd, the chairman of the benefits committee, notified Mrs. Wade by letter that, based on the medical examination, she was no longer totally disabled and that her benefits would cease. This letter also advised Mrs. Wade of her appeal right (J.A. 18, 19, 32). On October 25, 1985, Burroughs Wellcome further notified Mrs. Wade that because she was no longer totally disabled, and because no suitable opening was available for her, she was terminated from employment with Burroughs Wellcome as of October 10, 1985 (J.A. 19, 33).

At the request of Mrs. Wade's attorney, Mr. Kidd, on October 29th, forwarded a copy of Dr. Whitehurst's medical evaluation, and stated further that:

> Total disability under our long term disability plan uses the same test as defined under

> Section 423 (d) (1)- (2) (A) and (3) of Title 42 of the United States Code as in effect on January 1, 1976. Based on Dr. Whitehurst's evaluations I have determined she is not totally disabled. .
> .

(J.A. 19, 20, 34).

Mrs. Wade, then, pursuant to company rules, gave notice of appeal to the Burroughs Wellcome Benefits Committee on November 8, 1985 (J.A. 20, 48).

Mrs. Wade was shortly thereafter advised by Mr. Kidd that the Benefits Committee wanted further medicals, following which, pursuant to Mr. Kidd's instructions, Mrs. Wade visited Dr. Paul Burroughs in Raleigh (J.A. 21. 49). After also reviewing Mrs. Wade's records and examining her, Dr. Burroughs mirrored Dr. Whitehurst's opinion as to disability, also postulating that she should be able to do sedentary work (J.A. 51). Based on this report, Mr. Kidd, on January 16,

1986, again advised Mrs. Wade that she was no longer eligible for disability (J.A. 21, 22, 50). On February 14th thereafter, pursuant to Mrs. Wade's request, Mr. Kidd forwarded the Dr. Burroughs evaluation, and for an apparent "indication of the findings made to justify his decision," he stated that "Dr. Burroughs conclusion was that Mrs. Wade 'should be able to *do* sedentary work. . .'; To remain eligible for plan benefits, Mrs. Wade must be unable to engage in any substantial gainful employment as a result of her disability. . . ." Mr. Kidd further indicated that that message concluded the appeal (J.A. 22, 51).

Dr. Burroughs report (J.A. 51) indicated that, without any previous medical records, he first conferred with the plaintiff and then examined her (J.A. 52, 53, p. 1), he then took x-rays and

noted some changes in the lower back area and deformity in the elbow (p. 2). He then shows no difference in the lumbar spine area between his x-ray and that of Dr. Crisp in 1979 (p. 2). After indicating a problem with the left elbow, he, in his RECOMMENDATION, stated that:

> The reason for the permanent disability status is not clear on the basis of the limited information now available to me. Additional information will be sent and with it's receipt, the completion of the disability evaluation may be possible.
> 1-9-86--ADDENDUM: Burroughs Wellcome sent over the medical records from Mr. Briley which date to 1979. Examinations by Dr. Whitehurst, and by Dr. Crisp were present as well as by Dr. Bill Fore.
> No specific reason for complete disability rating is noted in the records from Burroughs Wellcome. On the basis of this examination, a 10% disability status of the elbow, as well as perhaps 5-10% disability of the back could be justified. I do not believe that the patient will be able to do any heavy working due to these factors but should be able to do

> sedentary work on the basis of information available to me.

(J.A. 22, 53).

The plaintiff Mrs. Wade thereafter filed this action on November 3, 1988, alleging wrongful discharge from the long-term disability program of the defendant, Burroughs Wellcome Co. (J.A. 16-23).

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT ERRED IN CONCLUDING THAT THE DECISION OF THE BENEFITS COMMITTEE WAS NOT ARBITRARY AND CAPRICIOUS DESPITE THE LACK OF ANY VOCATIONAL EXPERT TESTIMONY AS TO MRS. WADE'S ABILITY TO PERFORM OTHER WORK.

The decision by the benefits committee to terminate Mrs. Wade's benefits under the Burroughs Wellcome Long Term Disability Plan (the Plan) was based solely on the medical evaluations of Dr.

Whitehurst and Dr. Burroughs. Such a decision was arbitrary and capricious, given the Plan's definition of disability.

Under the Plan, a participant is totally disabled if, after one year of being unable to perform his prior job with the company, he is also unable to perform any other kind of substantial gainful work in the national economy considering his "age, education, and work experience." A review of the medical reports of Dr. Whitehurst and Dr. Burroughs shows no indication that the relevant factors of age, education, and work experience were considered. Their conclusions, therefore, that Mrs. Wade could perform light or sedentary work cannot be held to constitute the substantial evidence necessary to support the decision of the benefits committee.

While the arbitrary and capricious standard of review is a narrow one, see LeFebre v. Westinghouse Electrical Corp. 747 F.2d 197, 204 (4th Cir. 1984), "[a] reviewing court must 'consider whether the decision was based on a consideration of the relevant factors.'" Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc. 419 U.S. 281, 285 (1974) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)). Moreover, any "inquiry" by the reviewing court into the facts must also be "searching and careful." Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc. supra, 419 U.S. at 285.

Despite this lack of any showing of reliance upon the relevant factors, the Fourth Circuit affirmed the district court's granting of Burroughs Wellcome's

motion for summary judgment. It concluded:

> Hence, the only remaining question is whether the Committee's determination that Wade was not "totally disabled" was reasonable. We think it was. The plan's definition of total disability provided that after one year, a claimant would not be eligible for benefits if he could perform any substantial gainful work that exists in the national economy. In light of Dr. Whitehurst's two reports saying that Wade was capable of performing sedentary work, and the Committee's solicited report of Dr. Burroughs corroborating that conclusion, it was not unreasonable for the Committee to conclude that Wade was no longer "totally disabled" under the plan's definition.

Wade v. Burroughs Wellcome, No. 89-1542 at 6 (4th Cir. 1989) (footnote omitted).

It then determined that it was "unnecessary" to consider Mrs. Wade's other objections to the decision of the Benefits Committee, and in particular her specific assertion regarding the "failure

to seek the opinion of a vocational expert." This was plain error on the part of the Fourth Circuit. The requirement of the testimony of a vocational expert as to a plan participant's ability to engage in any other work goes right to the heart of any "reasonable" decision even under the arbitrary and capricious standard which admittedly governs this case. Firestone Tire & Rubber Co. v. Bruch, 109 S. Ct. 948, 956 (1989). It is the position of the petitioner herein that without a consideration of testimony from a vocational expert, no decision by the Benefits Committee may withstand even the limited standard of review which governs herein.

Such was the position of the Eighth Circuit Court of Appeals in Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan, 874 F.2d 496 (8th Cir. 1989).

The disability plan therein was similar to that of Burroughs Wellcome in that it contained two categories of disability--namely the inability to perform one's prior job and subsequently the inability to perform any job for which he "is or becomes reasonably qualified by training, education or experience." Id. at 498 n.2. There was no dispute between the parties that Gunderson was totally disabled under the first category of the plan. He could not perform his prior job. Id. at 498. The district court found there was not substantial evidence to support the determination by plan administrators that the employee Gunderson was not totally disabled under the second category. Id. On appeal, the Eighth Circuit affirmed that determination. It noted that Firestone Tire & Rubber Co. v. Bruch, 109 S. Ct. 948 (1989), which

establishes a de novo standard of review in ERISA cases where the benefit plan does not grant discretionary authority to the administrator, had been handed down in the interim between the district court opinion and its own decision. Nevertheless, it found that "the Plan's decision to terminate Gunderson's benefits falls under either an arbitrary and capricious standard or under a de novo standard." Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan, supra, 874 F.2d at 498-99 n.3.

The plan administrators sought to rely upon opinions of treating physicians that Gunderson was no longer disabled. Id. at 499. The court, however, held that such reliance was not sufficient. It declared:

> We agree that before terminating benefits, the Plan should have obtained a

> vocational expert's opinion to determine if Gunderson is presently capable, in light of his physical impairment, to perform "any occupation." See Jenkinson v. Chevron Corporation, 634 F.Supp. 375, 379 (N.D.Cal.1986) (citing Heckler v. Campbell, 461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983)). Without that information, we cannot say there was substantial evidence to support the Plan's decision. See Jenkinson, 634 F.Supp. at 379-80.

Id. (footnote omitted).

The Eighth Circuit specifically cited to a federal district court opinion Jenkinson v. Chevron Corp., 634 F.Supp. 375 (N.D.Cal.1986). In this latter decision, the district court also considered the lack of vocational expert testimony on the question of reasonable or substantial evidence in support of a decision terminating disability benefits. The long-term disability plan of Chevron was similar to that of Burroughs Wellcome Co. in the instant case as well as the W.R. Grace & Co. plan in Gunderson v. W.R.

Grace & Co. Long Term Disability Income Plan, supra. Total disability was defined as an inability to perform one's prior job for the first twenty-four months and, thereafter, an inability "to perform any occupation for which the Member is qualified or may reasonably become qualified by reason of education, training or experience." Jenkinson v. Chevron Corp., supra, 634 F.Supp. at 378. The court, Id. at 380, applied the substantial evidence test, specifically relying on the definition of that term as set forth by this court in LeFebre v. Westinghouse Electrical Corp. supra, and held that insufficient evidence was offered to support the decision to terminate benefits. Id at 378-79. The court added:

> Logic dictates that a determination as to whether the "any occupation" definition of disability has been met by a claimant requires consideration of two types of evidence.

> First, there must be evidence as to the medical condition or degree of impairment of the claimant. Additionally, there must be evidence as to the existence of jobs for those of the claimant's qualifications, or potential qualifications, in light of his or her impairment.

Id. at 379 (footnote omitted). "The vocational evidence in this case was far from substantial," said the court. Id. Mere conclusory statements by a physician were not sufficient. Id at 378-79, 380. The court added:

> In short, the "any occupation" test adopted in the plan requires that the fiduciary give meaningful consideration to plaintiff's vocational options. Such consideration cannot be rendered unless the record contains competent evidence linking the claimant's medical condition and other qualifications to his ability to perform specified jobs. In this case, the record is devoid of evidence which a reasoning mind would accept as sufficient to support the conclusion that there were jobs plaintiff could have performed. See LeFebre v. Westinghouse Electrical Corp., 747 F.2d 197, 208 (4th

Cir.1984) (defining "substantial evidence").

Id. at 380.

While the language of the disability plans in Gunderson and Jenkinson is not precisely identical to that of the Burroughs Wellcome Co. plan, the similarities are sufficient to permit the application of the rationales in both of the above decisions. The omission of the word "training" from the Burroughs Wellcome Co. plan does not, as the district court herein concluded, "distinguish" either Gunderson or Jenkinson (See p. 4 of the trial court's Order; A - 13). It must be remembered that the definition of disability under the Plan is merely the incorporated statutory language of the Social Security Act, 42 U.S.C. sec. 423 (d) (2) (A), which act requires that "age, education, and work experience" be considered.

Despite the lack of any reference to a claimant's "training," numerous courts have concluded that total disability under 42 U.S.C. sec. 423(d) (Addendum) cannot be determined without reliance on the testimony of vocational experts. See, e.g., Burkhart v. Bowen, 856 F.2d 1335, 1340-41 (9th Cir. 1988); Ferguson v. Schweiker, 641 F.2d 243, 247-48 (5th Cir. 1981); Warner v. Califano, 623 F.2d 521, 532 (8th Cir. 1981); Bover v. Califano, 598 F.2d 1117, 1119 (8th Cir. 1979); Hall v. Harris, 658 F.2d 260, 266, 267 (4th Cir. 1981); Wilson v. Califano, 617 F.2d. 1050, 1053-55 (4th Cir. 1980); Smith v. Califano, 592 F. 2d. 1235, 1236-37 (1979); Taylor v. Weinberger, 512 F.2d 664, 666-68 (4th Cir. 1975).

It is apparent, therefore, that the view of the Fourth Circuit herein is markedly divergent from that of the Eighth

Circuit in Gunderson v. W.R. Grace & Co. Long-Term Disability Income Plan, supra, and from at least one district court from the Ninth Circuit, Jenkinson v. Chevron Corporation, supra. There can be no doubt that given the scope and national impact of ERISA upon millions of workers, (see 29 U.S.C. Sec. 1001 (a) - (c)), there is a need for a uniform interpretation of the provisions which govern it. For this reason, it is imperative that the Court review the questions presented here. The disability plan of Burroughs Wellcome Co. is not unique. Its definition of "total disability" is similar to that of other employee welfare benefit plans which have been put into effect by other employers See eg., Gunderson v. W.R. Grace & Co. Long-Term Disability Income Plan, supra; Jenkinson v. Chevron Corporation, supra. While as yet there is only direct conflict

between two circuit courts of appeals on the issue of the necessity for expert vocational testimony, there is a likelihood that this confusion will grow. The grant of the writ of certiorari can resolve this dispute and end the confusion.

II. THE APPELLATE COURT ERRED IN REFUSING TO CONSIDER THE ISSUE OF WHETHER SOCIAL SECURITY LAW WAS APPLICABLE.

The Fourth Circuit erred when it dismissed Mrs. Wade's assertion that social security case law was applicable in resolving the question of whether the decision of the Benefits Committee was supported by reasonable evidence.

The decisional law cited, supra, relating to the need for a vocational expert's testimony in cases where benefits have been denied by the Social Security Secretary is not only particularly

relevant in the instant case but is also controlling, given the language of the Plan, which does not merely follow the language of the Social Security Act regarding the definition of disability, but specifically incorporates by reference that definition. The Plan provides that after a participant is unable for one year to perform his usual labor or service with the company, "during the continuation of such period beyond one year, the participant is under a 'disability' as that term is defined in Section 423(d)(1)-(2)(A), and -(3) of Title 42 of the United States Code, as in effect on January 1, 1976." (A - 37). Since Burroughs Wellcome Co. elected to incorporate the statutory definition of "disability," it is not unreasonable to apply the governing decisional law that has interpreted the language of that

definition. That decisional law is clear. "Ordinarily, the testimony of a vocational expert is required in order to support a finding that alternate jobs which the claimant can do exist in the national economy." Smith v. Califano, supra, 592 F.2d at 1236. While there may be an exception to such a requirement when the evidence of ability to perform other jobs is so clear as to be "within the common knowledge and experience of ordinary men, and requires no substantiation by a vocational expert," see McLamore v. Weinberger, 538 F.2d 572, 575 (4th Cir. 1976), that narrow exception is reluctantly applied. See Hall v. Harris, supra, 658 F.2d at 267, Wilson v. Califano, supra, 617 F.2d at 1054-55; Smith v. Califano, supra, 592 F.2d at 1236-37. Furthermore, the conclusory statements by the physicians who examined

Mrs. Wade, to the effect that she could perform other light or sedentary work in the national economy (App. 34, 52) do not meet the specificity required in the exception in McLamore v. Weinberger, supra, where the Social Security Secretary expressly considered the plan participant's age, education, the relative minor nature of his medical condition, and the availability of specific jobs for which the participant was qualified. 538 F.2d at 574-75.

As the Burroughs Wellcome Co. disability plan incorporates the social security definition of "disability" it would hardly appear justified in concluding that the testimony of a vocational expert is not needed in order to support a decision of the plan administrator even under the limited standard of review applied herein. The

Fourth Circuit's refusal to give any consideration to the objection of Mrs. Wade regarding the applicability of social security case law was, therefore, error.

WHEREFORE, this petitioner respectfully requests that this Court grant this petition and issue a Writ of Certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted, this the 17th day of September, 1990.

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1542

BARBARA J. GOURAS (WADE),
Plaintiff-Appellant,

versus

BURROUGHS WELLCOME COMPANY,
Defendant - Appellee

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Malcolm J. Howard, District Judge. (CA-88-137-4-CIV)

Submitted: January 18, 1990
Decided: May 7, 1990

Affirmed by unpublished per curiam opinion.

Willis A. Talton, Greenville, North Carolina, for Appellant. Charles R. Holton, Laura B. Luger, MOORE & VAN ALLEN, Durham, North Carolina; John Campion, Assistant General Counsel, BURROUGHS WELLCOME COMPANY?, Research Triangle Park, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Barbara Gouras Wade appeals the district court's grant of summary judgment for Burroughs Wellcome Company in this action under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Sec 1001 et seq., challenging Burroughs Wellcome's discontinuation of her long-term disability benefits. The district court granted summary judgment for Burroughs Wellcome because it found the company's denial of benefits was supported by substantial evidence and thus was not arbitrary and capricious. Although the district court applied the wrong standard in reviewing the company's termination of benefits, we affirm its udgment upon our application of the correct standard to the record evidence.

I

Wade worked as a Sterile Operator in Burroughs Wellcome's Greenville, North Carolina, production facility from December 1978 to May 1979, when she fell at work and injured her left arm and her back. She received benefits under Burroughs Wellcome's long-term disability (LTD) plan until 1985. In October 1985, Burroughs Wellcome terminated Wade's benefits when the company's Benefits Committee determined that she was no longer "totally disabled" under the LTD plan's definition. The plan provided that after more than a year of receiving LTD benefits a claimant had to show a "disability" within the meaning of 42 U.S.C. Sec. 423 (d)(1)-(2)(A), and -(3), which defines "disability" for purposes of the Social Security Act, in order to continue to be eligible to receive benefits.[1] Under the Social

Security Act definition, a claimant is not totally disabled if she can perform any substantial gainful work that exists in the national economy. Although the plan borrowed the Social Security Act's definition, it provided that

> [t]he determination of whether or not a participant is totally disabled shall be made by the Committee, based upon such evidence as the Committee deems necessary or desirable. The Committee may require one or more physical examinations of the Participants by a physician selected or approved by the Committee to determine the commencement or continuation of total disability.

Joint Appendix at 42.

The Benefits Committee's decision to discontinue Wade's benefits was based on the reports of two examining physicians who concluded that she could perform sedentary work. In September 1984, orthopedic specialist Dr. Lee Whitehurst examined Wade and found that at that time

she had, at most, a partial (10%) permanent disability in her left arm and that she was capable of performing sedentary work. Whitehurst examined Wade again one year later and reached the same conclusions. Acting on these reports, the Chairman of Burroughs Wellcome's Benefits Committee notified Wade in October 1985 that her LTD benefits had been terminated after reevaluation of her eligibility for them.[2] Wade exercised her right of appeal ot the Benefits Committee. The Committee then sought the expert opinion of Dr. Paul Burroughs of the Raleigh, North Carolina, Bone and Joint Clinic. Dr. Burroughs' conclusions were substantially the same as those of Dr. Whitehurst--that Wade had a 10% disability in her left arm and "perhaps" a 5% to 10% disability in her back and that she should be able to do sedentary work. The Benefits Committee

thus notified Wade that it had finally determined, based on Whitehurst's and Burroughs' reports--as well as Wade's failure to submit any additional evidence, that she was no longer eligible to receive LTD benefits.

Wade sued Burroughs Wellcome in Pitt County (North Carolina) Superior Court, seeking reimbursement and reinstatement of her LTD benefits. Burroughs Wellcome removed the case to federal district court and at the close of discovery moved for summary judgment. The district court granted Burroughs Wellcome's motion, reasoning that the Benefits Committee's decision was not arbitrary and capricious because it was supported by the substantial evidence of Drs. Whitehurst's and Burrough's medical reports. Wade now appeals.

II

Wade claims that the Committee's decision to terminate her benefits was arbitrary and capricious because it was made based solely on her medical condition, without reference to other relevant factors, and because it was made without the benefit of a vocational expert's testimony. Although we once used and arbitrary and capricious standard in reviewing denials of ERISA benefits, see Berry v. Ciba-Geigy Corp., 761 F.2d 1003 (4th Cir. 1985), and LeFebre v. Westinghouse Electric Corp., 747 F.2d 197 (4th Cir. 1984), the Supreme Court has now made it clear that such denials must be "reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 109 S. Ct.

948, 956 (1989). In the latter case, where the plan gives the trustee discretion to interpret its critical terms, a court should apply the deferential "abuse of discretion" standard and not disturb the trustee's interpretation if it is a reasonable one. Id. at 954.

The threshold question in this case, then, is a matter of contract interpretation: Has the plan given the Benefits Committee discretion "to determine eligibility for benefits or to construe terms of the plan?" Id. at 956. We think this plan clearly vested in the Benefits Committee the discretion to determine "total disability" and, thus, eligibility for LTD benefits. That grant of discretion is found in the provision stating that "[t]he determination of whether or not a participant is totally

disabled shall be made by the Committee, based upon such evidence as the Committee deems necessary or desirable." Joint Appendix at 42.

Hence, the only remaining question is whether the Committee's determination that Wade was not "totally disabled" was reasonable.[3] We think it was. The plan's definition of total disability provided that after one year, a claimant would not be eligible for benefits if he could perform any substantial gainful work that exists in the national economy. In light of Dr. Whitehurst's two reports saying that Wade was capable of performing sedentary work, and the Committee's solicited report of Dr. Burroughs corroborating that conclusion, it was not unreasonable for the Committee to conclude that Wade was no longer "totally disabled" under the plan's definition.

Under the standard we must use, we find it unnecessary to address Wade's specific objections to the Benefits Committee's weighing of the evidence before it and its claimed failure to seek the opinion of a vocational expert or to apply decisional law under the Social Security Act. Nor need we discuss Wade's further contentions that the district court improperly considered evidence not before the Benefits Committee and that this court should apply Social Security law. Rather, we affirm the judgment of the district court on the ground that the plan gave the Benefit Committee discretion to determine total disability and the Committee did not abuse that discretion in this case. We dispense with oral argument because the facts and legal arguments are adequately presented in the materials before the court and oral argument would

not significantly aid the decisional process.

AFFIRMED

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[1] The plan defined "Total Disability" as follows:

> A participant shall be determined by the Committee to be totally disabled if (1) the participant is unable, mentally or physically, to perform (i) the usual labor or services required of the participant as a full-time employee of the Company, and (ii) any other labor or services required of the participant by the Company taking into account the participant's education, training and experience or (2) during the continuation of such period beyond one year, the participant is under a disability as that term is defined in Section 423(d)(1)-(2)(A), and -(3) of Title 42 of the United States Code, as in effect on January 1, 1976.

Joint Appendix at 41-42.

[2] Burroughs Wellcome later terminated Wade's employment because it

had no position for a person of Wade's qualifications. That employment action is not at issue here.

[3] Wade has not suggested that the Benefits Committee operated under an actual or possible conflict of interest, a factor that in appropriate cases might warrant a finding of abuse of discretion. See Firestone, 109 S. Ct. at 956.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
NEW BERN DIVISION

CASE NO. 88-137-CIV-4-H

BARBARA J. GOURAS (WADE), Plaintiff,	)	
v.	)	ORDER
BURROUGHS WELLCOME COMPANY, Defendant.	)	

This matter is before the court on the motion of the defendant for summary judgment pursuant to F.R.Civ.P. 56. Plaintiff was granted two extensions of time in which to reply to the motion. On July 24, 1989, after the second extension had expired, plaintiff filed a motion for yet another extension of time, and contemporaneously filed a memorandum in opposition to the defendant's motion. Without specifically ruling on the request for an extension, the court has considered the response of the plaintiff. For the reasons indicated below, the court will

grant the defendant's motion for summary judgment and dismiss this action.

STATEMENT OF THE CASE

Plaintiff filed her complaint on November 3, 1988, in the General Court of Justice, Superior Court Division, of Pitt County, North Carolina, seeking reinstatement in defendant's long term disability plan. On December 12, 1988, defendant removed this action to this court, noting this court's jurisdiction over the subject matter pursuant to the Employee Retirement Income Security Act of 1974 (hereafter "ERISA") 29 U.S.C. sec. 1001 et seq. Discovery in this action closed on April 28, 1989. Defendant filed the instant motion on May 30, 1989, and the matter is now ripe for ruling.

FACTS

Plaintiff began working for defendant at defendant's plant in Greenville, North Carolina on December 26, 1978. On May 29, 1979, plaintiff suffered an injury at work. Plaintiff first received benefits under defendant's Sickness and Accident Plan. After exhausting those benefits, plaintiff began receiving benefits under defendant's Long Term Disability Plan (hereafter "LTD Plan"). She received these benefits in the amount of $97.48 per week until she was terminated. In 1984, plaintiff was examined by orthopedic surgeon, Dr. Lee A. Whitehurst, M.D., who found her able to perform sedentary work. In September 1985, the same doctor again reached the same conclusion. On October 10, 1985, defendant notified plaintiff by letter that based upon the medical evaluations, plaintiff was no longer totally disabled, and therefore no longer

eligible for benefits under the plan. This letter also advised plaintiff of her appeal rights. On October 25, 1985, defendant notified plaintiff that because she was no longer totally disabled, and because no suitable opening was available for her, that she was terminated from employment by defendant as of October 10, 1985. On October 29, 1985, defendant notified plaintiff's counsel that the determination of ineligibility was based upon the examinations of Dr. Whitehurst, and enclosed with the letter copies of Dr. Whitehurst's notes. On November 8, 1985, plaintiff appealed the decision to terminate her from the LTD Plan, but submitted no additional evidence in her behalf. On November 21, 1985, the defendant notified plaintiff that the termination decision was being reviewed, and that an appointment with another

physician was being scheduled for her. Plaintiff was examined by Dr. Paul Burroughs of Raleigh on December 30, 1985. Dr. Burroughs concluded that plaintiff was not totally disabled, but capable of performing sedentary work. On January 16, 1986, defendant notified plaintiff that her appeal had been rejected and that she was not totally disabled under the LTD Plan. In response to a letter from plaintiff's counsel, defendant on February 14, 1986 forwarded Dr. Burroughs' records to plaintiff's counsel, and reiterated that the defendant's Benefits Committee had offered to consider any additional evidence that plaintiff had sought to submit, and that plaintiff had not submitted any. Finally, in 1988, this action followed.

DISCUSSION

Defendant correctly points out that the only question before the court is whether or not the decision of the defendant's Benefits Committee to terminate plaintiff from the LTD plan was arbitrary and capricious; in other words, was the decision to terminate plaintiff supported by substantial evidence. Berry v. Ciba-Geigy Corp., 761 F.2d 1003 (4th Cir. 1985). Substantial evidence has been defined as "more than a mere scintilla of evidence that may be somewhat less than a preponderance," or "evidence to justify a refusal to direct a verdict were the case before a jury . . ." LeFebre v. Westinghouse Electric Corp., 747 F.2d 197 (4th Cir. 1984), quoting Laws v. Celebrezze, 368 F.2d 640, at 642 (4th Cir. 1966).

The record of this case clearly indicates that the decision of the

defendant to terminate plaintiff from the LTD plan was not arbitrary and capricious, but was indeed supported by substantial evidence. Three different medical examinations by two different doctors both concluded that plaintiff was capable of some gainful employment. Such findings by competent physicians led the Benefits Committee to the conclusion that plaintiff was no longer totally disabled. Plaintiff claims that the defendant did not consider vocational evidence when making the decision to terminate plaintiff from the LTD plan. In support of this, plaintiff cites Gunderson v. W.R. Grace Long Term Disability Income Plan, 874 F.2d 496 (8th Cir. 1989). Gunderson, however, is distinguishable. The plan at issue in Gunderson specifically made vocational evidence relevant in determining the definition of total disability. The LTD

plan at issue in this case does not. The LTD plan makes clear that if the covered individual can perform any job in the national economy, then that individual is not totally disabled. Such is the evidence in this case. The examining physicians both certified that plaintiff can perform sedentary work. Indeed, the record demonstrates that plaintiff has admitted this to be true. The law of this circuit does not require that a plan administrator review vocational evidence before terminating an individual from a plan. LeFebre, supra, Berry, supra. In Berry, the Fourth Circuit held that Ciba Geigy's reliance on the statements of treating physicians alone was permissible. Therefore, based upon the applicable standards of review and the law of this circuit, substantial evidence existed to justify the decision by defendant to

terminate plaintiff from the LTD plan. As well, the Benefits Committee invited plaintiff to submit additional evidence before making a final ruling. Certainly she could have proffered vocational evidence at that time. This, however, she chose not to do. Accordingly, for all of these reasons, there exists no genuine issue of material fact, and the defendant is entitled to judgment as a matter of law. Therefore, summary judgment is proper for the defendant.

Plaintiff also claims that defendant applied an erroneous standard of law in its decision to terminate plaintiff from the LTD plan. The court finds no evidence to support this argument whatsoever. As stated above, the defendant corrected stated the applicable standard of law, and the evidence is that defendant followed that law when terminating plaintiff from

the LTD plan. No further consideration of this argument is warranted.

In summary, it is hereby ORDERED that the motion of defendant for summary judgment pursuant to F.R.Civ.P. 56 is GRANTED. Accordingly, this action is DISMISSED.

This the 14th day of August, 1989.

s/ Malcolm J. Howard
United States District Judge

AT GREENVILLE, NORTH CAROLINA
#23

CONFORMED: Including amendments through October 13th

BURROUGHS WELLCOME CO.

LONG-TERM DISABILITY PLAN

Burroughs Wellcome Co. hereby amends its Long-Term Disability Plan, effective January 1, 1976, to read in its entirety as follows:

1. DEFINITIONS.

(a) Board of Directors. "Board of Directors" means the Board of Directors of the Company as from time to time constituted.

(b) Committee. "Committee" means the persons appointed by, and

who shall serve at the pleasure of, the Board of Directors to administer this Plan and to review participants' petitions regarding benefits under this Plan. For purposes of ERISA, the Committee shall be deemed to be the "administrator" with regard to this Plan.

(e) ERISA "ERISA" means the Employee Retirement Income Security Act of 1974, as now in effect and as may be hereafter amended.

(f) Full-time Employment. A person is in the "full-time employment" or is a "full-time employee" of the Company if (1) such person is employed by the

Company; (2) the usual service for which such person is compensated by the Company is for at least 20 hours per week; and (3) the duration of such person's employment with the Company, as established between such person and the Company at the commencement thereof, is not for a period of less than 12 months. An employee who is on a Company-approved leave of absence without pay and who was a full-time employee immediately prior to such leave shall continue to qualify for benefits under and subject to all other terms and conditions of this Plan for any total disability occurring during such leave.

(g) Participant. Each full-time employee of the Company who was a participant in the Company's Long-Term Disability Plan as it existed on the day immediately preceding the effective date hereof, shall continue to be a participant of this Plan, as amended. Except as provided hereinafter, each other full-time employee of the Company shall become a participant of this Plan on the first day of the month coincident with or next following his commencement of continuous full-time employment with the Company. An employee of the Company whose terms and conditions of employment are covered by a collective

bargaining agreement shall not become a participant in this Plan, except and then only to the extent such collective bargaining agreement specifically provides for participation in this Plan.

(k) Total Disability. A participant shall be determined by the Committee to be "totally disabled" if (1) during the first year of any period for which a claim is made hereunder, the participant is unable, mentally or physically, to perform (i) the usual labor or services required of the participant as a full-time employee of the Company, and (ii) any other labor or services

required of the participant by the Company taking into account the participant's education, training and experience or (2) during the continuation of such period beyond one year, the participant is under a disability as that term is defined in Section 423(d)(1)-(2)(A), and -(3) of Title 42 of the United States Code, as in effect on January 1, 1976. The determination of whether or not a participant is totally disabled shall be made by the Committee, based upon such evidence as the Committee deems necessary or desirable. The Committee may require one or more physical examinations of the Participant by a physician selected or approved by the

Committee to determine the commencement or continuation of total disability. ---

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2. BENEFITS

(a) BENEFIT PERIOD. To be eligible for benefit payments under this Plan, the participant must have received the maximum benefits payable pursuant to the Company's Sickness and Accident Plan, and must thereafter be totally disabled, from the same cause or directly related causes, continuously; provided, however, that continuity of total disability due to the same cause or directly related causes shall not be considered broken, if interrupted one or more times

by less than two consecutive weeks of full-time employment with he Company or by rehabilitative employment.

Benefits, as provided in paragraph 2(b), below, shall be payable for the period of continuous total disability commencing with the first day of total disability following the last day for which payment was made of the maximum benefits payable pursuant to the Company's sickness and Accident Plan, and terminating as of the last day of the month during which the earliest of the following occurs:

(1) The death of the participant;

(ii) The cessation of continuous total disability of the participant; or

(iii) The termination of the Plan.

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3. Administration of Plan

(b) Claims Procedure. The Committee shall have authority to construe any ambiguities or reconcile any inconsistencies contained in the provision s of this Plan in such manner and to such extent as the Committee, in its sole discretion, may determine, and any such action of the Committee shall be binding and conclusive upon all

participants. The Committee shall make all determinations as to the right of any persons to a benefit under this Plan. Any denial by the Committee of the claim for benefits under thsis Plan by a participant shall be stated in writing by the Committee and delivered or mailed to the participant; and such notice shall set forth the specific reasons for the denial. In addition, the Committee shall afford a reasonable opportunity to any participant whose claim for benefits has been denied for a review of the decision denying the claim. The determination of the Committee upon review shall be binding and conclusive.

PROTECTION OF EMPLOYEE BENEFITS RIGHTS

GENERAL PROVISIONS

Sec. 1001. Congressional findings and declaration of Policy

(a) Benefit plans as affecting interstate commerce and the Federal Taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans inr ecent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide

for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatm ent; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with

respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees and by requiring plan termination insurance.
(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle A, Sec. 2, 88 Stat. 832.)

Sec. 1001b. Findings and declaration of policy.

(a) Findings. The Congress finds that--
(1) single-employer defined benefit pension plans have a substantial impact on interstate commerce and are affected with a national interest;
(2) the continued well-being and retirement income security of millions of workers, retirees, and their dependents are directly affected by such plans;
(3) the existence of a sound termination insurance system is fundamental to the retirement income

security of participants and beneficiaries of such plans; and

(4) the current termination insurance system in some instances encourages employers to terminate pension plans, evade their obligations to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and the other premium-payers.

42 U.S.C. 423

(1)(A)
"The term 'disability' means---inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or (not pertinent)."

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(2) For purposes of Paragraph (1)(A)---
(A) An individual---shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.
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(3) For purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical,

physiological, or psychological abnormalities which we are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 18, 1990

No. 89-1542

BARBARA J. GOURAS (WADE)

Plaintiff - Appellant

v.

BURROUGHS WELLCOME COMPANY

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Ervin and Judge Russell.

For the Court,

s/ John M. Greacen
Clerk